No. 12,457

IN THE

United States Court of Appeals

For the Ninth Circuit

KURT ADOLPH TAUCHEN,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,

Appellee.

Reply Brief on Behalf of Appellant

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Appellee's Brief attempts, and fails, to do three things:

1. To deprive this Court of the right to pass upon the merits of the case, by challenging jurisdiction;
2. To present a picture of the applicable authorities so confused as to define no limits whatever to judicial discretion; and

3. To rationalize the trial court's misreading of the present Record.

Only the second of these points requires any extended discussion. The others are adverted to only to the extent necessary to avoid any inference that appellee's contentions are unchallenged.

JURISDICTION IS NOT AFFECTED BY THE DESIGNATION OF THE APPELLEE

The jurisdictional point argued by appellee has been argued and submitted for decision by this Court in *Jim Yuen Jung v. Barber, etc.,* No. 12455, but has not been decided at this writing.

It is manifestly insubstantial, because since the abolition of the practice of citation on appeal, appellants have not been required even to name the appellees in their notices of appeal (*Moore's "Federal Practice,"* Section 73.03, p. 3395), and appellant did not. The captioning of the appeal was entirely that of the clerks of the District Court and of this Court.

APPELLEE DOES NOT CITE AUTHORITY FOR THE SCOPE OF JUDICIAL DISCRETION CONTENDED FOR HEREIN

Appellee pointedly omits all discussion of the decision of the Circuit Court of Appeals for the First Circuit in *Tutun v. U. S.,* 12 Fed.(2d) 763 squarely supporting appellant's contention that even the "wide discretion * * * lodged in the judge who hears a petition for naturalization" cannot be exercised to raise as a bar against a petitioner for citizenship, a lawful claim of exemption from military service which Congress has not seen fit to declare disqualifying.

Instead, appellee introduces confusion by the citation of District Court decisions which are clearly obsolete when viewed in the light of later decisions, and by the citation of others wholly irrelevant to the questions presented by this appeal.

Thus, the *Silberschutz* and *Tomarchio* decisions,[1] rendered in 1920, were followed in 1921 by Judge Tuttle's well-reasoned opinion in *In re Miegel,* 272 Fed. 688 citing and discussing these cases and categorically disagreeing with them in a situation which was factually and legally identical.

Similarly, the *Rubin* decision,[2] in 1921, was followed by Judge Borquin's exhaustive opinion in *In re Siem,* 284 Fed. 868, in 1922, granting citizenship in precisely the same factual and legal situation in which it had earlier been refused.

Again, the *Shanin* and *Escher* decisions, in 1922, and the *Bevelacqua* decision,[3] in 1924, were followed by the decision of the Circuit Court of Appeals for the First Circuit in *Tutun v. U. S.,* 12 Fed.(2d) 763 in 1926 in a factually and legally identical situation, and the decision of the Circuit Court of Appeals for the Second Circuit in *Petition of Kohl,* 146 Fed.(2d) 347 in a situation involving the same principles, although factually differentiated by the basing of the claim for exemption from military service on grounds other than alienage.

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(1) *In re Silberschutz,* 269 Fed. 398 and *In re Tomarchio,* 269 Fed. 400; Appellee's Brief, page 8.

(2) *In re Rubin,* 272 Fed. 697; Appellee's Brief, page 8.

(3) *In re Shanin,* 278 Fed. 739; *Petition of Escher,* 279 Fed. 792; and *In re Bevelacqua,* 295 Fed. 862; Appellee's Brief, page 8.

Thus was Judge Borquin's sage observation borne out, even in the opinions following his own:

> "Incidentally, as the war and its emotions recede, it is interesting to note that the earliest of said decisions denied admission 'with prejudice'; the later, without this futile excommunication; the latest, with express leave to renew; and now is the instant proceeding with its decision granting admission." (284 Fed. at p. 869.)

The *Hauge* decision[4] of this Court is wholly irrelevant to the questions presented by this appeal. The *Hauge* decision affirmed a conviction for perjury where the appellant had falsely sworn, in his naturalization proceeding, that he had not claimed military exemption on the ground of alienage. Materiality of the fact falsified was clear because a declarant neutral alien could obtain exemption from military service only by withdrawing his declaration and becoming permanently disqualified for citizenship; while a non-declarant neutral alien was not, by law, entitled to exemption. The broad language of the opinion is therefore unnecessary to the decision and must be regarded as dictum.

The *Labeko* decision[5] of this Court involved a new petition of an applicant who previously had permanently disqualified himself for citizenship by withdrawing his declaration of intention as prescribed by the statute (40 Stat. 884). The decision merely held that the statute meant what it said, i.e., that the applicant could *never* become a citizen because Congress, not the courts, had imposed the disqualification.

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(4) *Hauge v. U. S.*, 276 Fed. 111; Appellee's Brief, page 8.

(5) *Labeko v. Carr*, 111 Fed.(2d) 732; Appellee's Brief, page 8.

APPELLEE FAILS TO RATIONALIZE THE TRIAL COURT'S MISREADING OF THE RECORD

Appellee challenges the demonstration, at page 15 of the Brief on Behalf of Appellant, that appellant fully stated the reasons for his actions "while in internment."

The challenge is based upon an assertion that "the petitioner had just previously been interrogated by the Designated Examiner" (Appellee's Brief, page 10), which may or may not be true but is not disclosed by the Record herein.

From this assertion appellee draws the conclusion that the Designated Examiner was reporting, not on what appellant said "while in internment," but on what he said in this unrecorded interrogation.

It is submitted that the Record speaks for itself and must be interpreted without reference to matter *dehors* the record suggested in appellee's brief. The government's officers have at least as great an obligation to make themselves clear as they seek to impose upon appellant. Compare Appellee's Brief, page 12.

CONCLUSION

It is submitted that the weight of authority as evidenced by the cited decisions of the Circuit Courts of Appeal for the First and Second Circuits as well as by the more recent District Court cases cited, shows the bounds of judicial discretion to be clearly defined and to have been exceeded in this case.

The judgment appealed from should therefore be reversed.

Respectfully submitted,

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Attorney for Appellant.